Supreme Court, U.S.
FILED

No. 10-

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IN THE
Supreme Court of the United States

FIRST BANK,

Petitioner,

v.

DJL PROPERTIES, LLC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100 (1941) prohibits a counterclaim defendant from removing a class action counterclaim under the Class Action Fairness Act, 28 U.S.C. § 1453(b)?

COMPLETE LISTING OF PARTIES

First Bank
DJL Properties, LLC
Jonathon E. Guthrie
Lisa M. Guthrie
Metro East Sanitary District
American Bottoms Regional Wastewater Treatment Facility
Land of Lincoln Securities
Village of Sauget
Raven Securities, Inc.
St. Clair County Trustee
VI Inc.

RULE 29.6 STATEMENT

First Bank is chartered in Missouri with its principal place of business in Creve Coeur, Missouri. First Bank's parent company is The San Francisco Company, which is wholly owned by First Banks, Inc. No publicly held corporation owns 10% or more of First Bank's stock.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The orders of the district court remanding the cases to state court (App., *infra*, 6a-17a) are not published in either the *Federal Supplement* or *Federal Reporter*, but are available at 2010 U.S. Dist. LEXIS 7204 and 2010 U.S. Dist. LEXIS 7700. The opinion of the court of appeals affirming the district court's ruling (App., *infra*, 1a-5a) is reported at 598 F.3d 915. The order denying rehearing and rehearing *en banc* (App., *infra*, 18a-19a) is not published in either the *Federal Supplement* or *Federal Reporter*, but is available at 2010 U.S. App. LEXIS 8950.

JURISDICTION

The court of appeals entered its opinion and judgment on March 24, 2010. The order denying Petitioner's petition for rehearing and rehearing *en banc* was entered on April 22, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the following statutory provisions are reproduced in the Appendix: Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4-5; 28 U.S.C. § 1332; 28 U.S.C. § 1441; 28 U.S.C. § 1446; and 28 U.S.C. § 1453. App., *infra*, 20a-39a.

STATEMENT OF THE CASE

The issue in this case is whether this Court's holding in *Shamrock Oil v. Sheets*, 313 U.S. 100 (1941) prohibits a counterclaim defendant from removing a qualifying class action under 28 U.S.C. § 1453(b), the class action removal statute enacted as part of the Class Action Fairness Act of 2005 ("CAFA" or "Act"). The Seventh Circuit Court of Appeals, citing *Shamrock Oil*, declared that § 1453(b) does not allow counterclaim defendants to remove otherwise qualifying class actions to federal district courts because a counterclaim defendant is not a "defendant" under § 1453(b). The effect of the Seventh Circuit's holding is that plaintiffs whose claims satisfy the prerequisites for federal jurisdiction under CAFA may avoid federal court jurisdiction merely by bringing their class actions as counterclaims, even though the language of CAFA forecloses such maneuverings by class action plaintiffs. The panel's holding is inconsistent with both the text and purposes of CAFA.

A. Proceedings in State Court

Petitioner First Bank initiated its Complaint for Breach of Note and Guarantees against Respondent DJL Properties, LLC ("DJL) on May 12, 2009, in the Circuit Court of St. Clair County, Illinois, Case No. 09-L-238. On May 18, 2009, Petitioner First Bank filed a separate lawsuit in St. Clair County, Illinois to foreclose the relevant mortgage, Case No. 09-CH-506. Approximately four months later, without leave of court and without having filed an answer, DJL filed a Class Action Counterclaim against First Bank on October 20, 2009 in both the foreclosure action and the action based

upon breach of the promissory note. The Class Action Counterclaims were identical. The Class Action Counterclaims asserted state statutory and breach of contract claims. App., *infra*, 9a.

B. Proceedings in the District Court

On November 19, 2009, First Bank removed both lawsuits to the United States District Court for the Southern District of Illinois.[1] *See* App., *infra*, 9a. In its Notice of Removal, First Bank acknowledged the rule of *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100 (1941), where this Court construed the statutory predecessor to 28 U.S.C. § 1441 as limiting removal rights to "the defendant or defendants" and, thus, prohibiting plaintiffs/counterclaim defendants from enjoying removal rights. App., *infra*, 10a. First Bank, however, submitted that the express language of § 1453(b), enacted as part of CAFA, permits "any defendant," including a counterclaim defendant, to remove "a class action" to federal court. App., *infra*, 11a-12a, 15a. First Bank further argued that in *Shamrock Oil* the Court construed different language in a different statute and, thus, its holding did not bar the removal. App., *infra*, 10a.

1. Upon removal to the United States District Court of the Southern District of Illinois, the Complaint to Foreclose Mortgage was assigned Cause No. 09-cv-970-JPG, and was assigned to the Honorable J. Phil Gilbert for decision. The Complaint for Breach of Note and Breach of Guarantees was assigned Cause No. 09-cv 969-MJR, and was assigned to the Honorable Michael J. Reagan for decision.

Each case was remanded to state court in late January 2010.[2] The district court held that CAFA did not alter the rule of *Shamrock Oil* that only "the defendant," and not plaintiff/counterclaim defendants, may remove cases to federal court, even class action counterclaims that otherwise satisfy the requirements of CAFA. App., *infra*, 6a-17a. The district court stated, "When viewed with the legal landscape as it existed when CAFA was enacted and in the context of the removal statutes as a whole, the Court believes 'any defendant' is more likely to mean 'any of the defendants,' with 'defendants' being interpreted as it was in *Shamrock Oil*." App., *infra*, 15a. The district court concluded that it "can only interpret the laws as they are written." App., *infra*, 15a.

C. Proceedings in the Appellate Court

On February 5, 2010, First Bank filed petitions for leave to appeal to the Seventh Circuit Court of Appeals in each case.[3] *See* App., *infra*, 1a-5a. The Seventh Circuit had jurisdiction to review the remand orders of the district courts pursuant to 28 U.S.C. § 1453(c)(1). 28 U.S.C. § 1453(c)(1). First Bank's petition argued that

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2. Only Judge Gilbert's order to remand the case to state court contained an opinion. *See* App., *infra*, 8a-17a. Judge Reagan adopted the reasoning of Judge Gilbert's opinion and likewise ordered Cause No. 09-cv-969-MJR remanded to state court. *See* App., *infra*, 6a-7a.

3. The Complaint to Foreclose Mortgage was assigned Case No. 10-8008 in the Seventh Circuit. The Complaint for Breach of Note and Breach of Guarantees was assigned Case No. 10-8009.

§ 1453(b) expressly authorizes "any defendant" to remove qualifying class actions to federal court including class actions brought as counterclaims. App., *infra*, 2a, 38a. First Bank requested the Seventh Circuit to reverse the district court's remand orders and remand the case to the district court for further proceedings.

In its order,[4] the panel granted First Bank's petition for leave to appeal, "because the cases present an issue not yet resolved in this circuit." App., *infra*, 2a. The panel simultaneously issued its decision affirming the orders of the federal district court remanding these matters to the circuit court of St. Clair County, Illinois. App., *infra*, 1a-5a. The panel reasoned that the two appellate circuits that have held that counterclaim defendants may not remove class action counterclaims to federal court under CAFA, *Palisades Collections, LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008) *cert. denied, AT&T Mobility LLC v. Shorts*, 129 S.Ct. 2826 (2009); *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir. 2007), were correct in so holding. App., *infra*, 3a. The panel noted that § 1453 says that a class action may be removed "in accordance with section 1446." App., *infra*, 3a. Because § 1446 identifies the procedures used to remove cases, and § 1441, which creates the general right of removal, states that

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4. In addition, because DJL filed the exact same counterclaims in each case, First Bank filed a Motion to Consolidate Consideration and Briefing of the Petition for Permission to Appeal. Though the Seventh Circuit did not issue a formal order granting the motion, on March 24, 2010, it issued a single order and opinion addressing both petitions for leave to appeal. App, *infra*, 1a-5a. Thus, Petitioner has filed this single Petition for Writ of Certiorari.

"defendants" may remove a suit, the panel reasoned consistent with *Shamrock Oil* that First Bank is not a "defendant" under § 1441 or § 1446. App., *infra*, 3a-4a. The panel further reasoned that the word "any" in § 1453 does not imply that "defendant" means something different in § 1453 than in either § 1441 or § 1446. App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit Court of Appeals held that a party forced to defend a class action that is otherwise removable under CAFA cannot remove the case pursuant to § 1453(b) if it is a counterclaim defendant and not a defendant as defined in *Shamrock Oil*. App., *infra*, 5a. The panel's interpretation ignores both the language of § 1453(b) and the purpose for which CAFA was enacted. Moreover, its construction forecloses CAFA's protections to an entire class of defendants confronted with the types of class actions that Congress determined should be heard in federal courts. This creates a gaping loophole that Congress intended to prevent.

Although the courts of appeal that have confronted this issue are not split in their interpretations of § 1453(b), this Court should grant this petition because this Court has not decided this important issue and the Seventh Circuit's holding creates a loophole that raises a question of statutory construction of national importance. Plaintiffs' counsels from across the nation are increasingly aware of this loophole in CAFA's protections created by these incorrect rulings. Without guidance from this Court, the exact types of class actions that Congress deemed should be litigated in federal

court due to their abusive nature nonetheless will remain in state court merely because they are labeled as counterclaims. CAFA will become completely ineffectual. This Court, therefore, should grant review of the panel's decision.

A. The Seventh Circuit's Holding Is In Error Because the Class Action Fairness Act Expressly Authorizes Removal by Counterclaim Defendants.

The Seventh Circuit's judgment affirming the district court's remand orders is in error because it ignores the plain meaning of § 1453(b)'s terms. The rule articulated by this Court in *Shamrock Oil* should not operate to bar counterclaim defendants from availing themselves of federal jurisdiction over qualifying class actions granted by CAFA. The clear text of § 1453(b) and the factual findings made by Congress in enacting CAFA, when compared to this Court's construction of the statutory predecessor to 28 U.S.C. § 1441(a) in *Shamrock Oil*, indicate that *any* defendant should be able to remove certain class actions to federal court.

This Court in *Shamrock Oil* pronounced the general rule that only original defendants may remove a case to federal court. *Shamrock Oil*, 313 U.S. 100. However, *Shamrock Oil*, decided in 1941, should not operate to preclude counterclaim defendants from removing qualifying class actions under § 1453(b). *Shamrock Oil* did not broadly define "defendant" for all removal contexts; rather, it interpreted what the phrase "the defendant" meant when adopted by Congress to replace "either party" in an earlier version of § 1441(a). *See Id.*; *Palisades Collections, LLC v. Shorts*, 552 F.3d 327, 340

(4th Cir. 2008) (Niemeyer, J., dissenting). The Court held that when Congress changed the removal statute to exclude "either party" and changed the language to "the defendant or the defendants," it sought to limit removal to defendants and did not extend it to a plaintiff/counterclaim defendant. *See Shamrock Oil*, 313 U.S. at 107; *Palisades Collections, LLC*, 552 F.3d at 341-342 (Niemeyer, J., dissenting). The Court also reasoned that the change in statutory text reflected Congress' desire to restrict removal jurisdiction. *Shamrock Oil*, 313 U.S. at 107. In contrast, Congress enacted § 1453 as part of the Class Action Fairness Act of 2005, and in doing so expressly intended to expand federal removal jurisdiction. Section 1453(b) states:

> A class action may be removed to the district court of the United States in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. § 1453(b).

When construing statutes, courts are directed to "give words their plain meaning." *U.S. v. Jones*, 372 F.3d 910, 912 (7th Cir. 2004). Each word is to be interpreted and given effect so that none is rendered meaningless. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The panel ignored these canons of statutory construction when it equated the words "the defendant or the defendants" as discussed in *Shamrock Oil* and as used in § 1441(a) with the words "any defendant" in § 1453(b).

By it terms, § 1453(b) is addressed to "any defendant." 28 U.S.C. § 1453(b). "Any" is an expansive term, and one this Court consistently finds when read naturally means "one or some indiscriminately of whatever kind." *Palisades Collections, LLC*, 552 F.3d at 339 (Niemeyer, J., dissenting). When the word "'any' precedes a noun, the meaning of the noun is expanded." *Id.* As used in § 1453(b), the phrase "any defendant" expands the kinds of defendants that may remove an action. Section 1453(b), therefore, expands removal authority beyond the limits of § 1441(a)'s "the defendant" to "any defendant" joined as an additional defendant to a counterclaim, as well as any counterclaim defendant, as is Petitioner in this case. *Id.* Further, when it enacted CAFA, Congress was keenly aware of the expansive meaning courts ascribe to the word "any" when interpreting statutory text. *See U.S. v. Gonzalez*, 520 U.S. 1, 5 (1997).

The Seventh Circuit's limitation on the types of defendants to which § 1453(b) applies – only "the [original] defendant" – contradicts the statute by importing limitations that are not present in the text. Section 1453(b) states, "a class action may be removed to the district court of the United States" by any defendant. 28 U.S.C. § 1453(b). In contrast, the general removal statute for diversity cases, § 1441(a), states, "any civil action . . . may be removed by the defendant or defendants." 28 U.S.C. § 1441(a). Section 1441(a) imposes limitations on removal by restricting it only to "the defendant." *Id.* Section 1453(b), however, does not have this same limiting language. It simply states any defendant may remove a qualifying class action. In *Gladstone Realtors v. Vill. of Bellwood*, this Court held

that the statute at issue in that case did not restrict the class of plaintiffs that may assert rights under its terms because the statute itself did not contain any restrictions. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 102-103 (1979). Similarly, since § 1453(b) contains no restrictions on the sort of defendant that may remove qualifying class actions, it was erroneous for the panel to import such restrictions.

Moreover, § 1453(b) expressly permits "a class action" to be removed and § 1332(d)(1)(B) defines "class action" as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute . . . authorizing an action be brought . . . as a class action." 28 U.S.C. § 1332(d)(1)(B). "Any" class action, including class action counterclaims, are within the purview of CAFA's removal jurisdiction and the panel's decision improperly prevents removal of the class action counterclaim brought against First Bank.

The Seventh Circuit acknowledged that "any" modifies the word "defendant" in § 1453(b). Nonetheless, it maintained that "any" had no effect on the word defendant. App., *infra*, 4a. Rather, according to the panel, the word "any" as used in § 1453(b) merely eliminates the restrictions imposed by § 1441(b) that home-state defendants cannot remove causes of action. App., *infra*, 4a. The panel further noted that the second "any" in § 1453(b) only eliminated the application of the rule in *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245 (1900) that required defendants to unanimously consent to removal. App., *infra*, 4a. Thus, according to the Seventh Circuit, the inclusion of the word "any" in § 1453(b) eliminated the application of two long-standing rules that govern the application of the general removal statute.

This analysis is incompatible with the panel's finding that the use of "any" does not also render the holding of *Shamrock Oil* inapplicable to class action counterclaim defendants. According to the panel, the only long-standing rule that § 1453(b) did not alter was the rule this Court articulated in *Shamrock Oil* that permits only an original defendant to remove a case. In his well-reasoned dissent in *Palisades Collections, LLC v. Shorts*, the Honorable Paul V. Niemeyer examined the inconsistency created by this statutory interpretation. *Palisades Collections, LLC*, 552 F.3d at 339-340. He noted the same clauses that negate the application of these long-standing rules ought to be construed to "abolish *Shamrock Oil's* rule for CAFA purposes given that both *Shamrock Oil* and *Martin* were based on the exact same language in § 1441(a)'s predecessor statute." *Id.* He stated "[i]t seems implausible at best that the § 1453(b) language abolished the *Martin* rule while leaving untouched the *Shamrock Oil* rule, especially when both rules depended on the same language." *Id.*

The panel's holding was also based upon the interpretation of the word "defendants" in § 1441 and § 1446. The panel reasoned that if § 1453(b) allows counterclaim defendants to remove qualifying class actions, then § 1453(b), § 1441 and § 1446 are incoherent because the term "defendant" would have inconsistent meanings. App., *infra*, 4a-5a. This analysis, however, is an artificial barrier to interpreting § 1453(b) in accord with its plain meaning. Without question, § 1453(b) states that the removal of a class action is to be executed in accordance with § 1446. But, as Judge Niemeyer explained, § 1446 merely sets forth the procedure for removing cases and the reference to § 1446 in § 1453(b)

should not be construed as limiting the types of defendants that can remove class actions. *Palisades Collections, LLC*, 552 F.3d at 339-340.

Moreover, it is immaterial that § 1441 uses the phrase "the defendant or the defendants." Section 1441(a) provides the general rule for certain removals, stating that civil actions "of which the district courts of the United States have original jurisdiction, may be removed by *the* defendant or *the* defendants." 28 U.S.C. § 1441(a) (emphasis added). In contrast to § 1441(a), § 1453(b) provides a more expansive right to remove certain types of "civil actions" - class actions. It permits a class action to be removed to a district court "without regard to whether *any* defendant is a citizen of the State in which the action is brought, except that such action may be removed by *any* defendant without the consent of all defendants." 28 U.S.C. § 1453(b)(emphasis added). First Bank submits, as did Judge Niemeyer in his dissent in *Palisades Collection, LLC*, that § 1453(b) "expands removal authority beyond the limits of § 1441(a) so that it includes any defendant joined as an additional defendant to a counterclaim, as well as any counterclaim defendant." *Palisades Collection, LLC*, 552 F.3d at 339. Thus, the panel was incorrect in suggesting that "defendant" has a specific legal meaning such that if "defendant" includes counterclaim defendants, the term "defendant" would be interpreted inconsistently. Nor is it correct to suggest that interpreting § 1453(b) to include any type of defendant endangers the ability of Congress to understand what effect proposed language may have, or cloud the general public's understanding of the meaning of statutes. Instead, this interpretation gives effect to the

expansive meaning of "any" in § 1453(b). The panel's interpretation effectively changes the statutory text from "any" to "the," which is contrary to well-recognized rules of statutory construction.

B. The Seventh Circuit's Holding is Erroneous Because It Ignores the Purposes for Which CAFA Was Enacted.

Congress made several "Findings" that explained the need for the passage of CAFA. Class Action Fairness Act of 2005, Pub. L. 109-2, § 2, 119 Stat. 4-5. Congress concluded CAFA was necessary because, "[a]buses in class actions undermine the judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution." *Id.* at § 2(a)(4). One specific abuse identified was the practice of "keeping cases of national importance out of Federal court." *Id.* at § 2(a)(4)(C).

Moreover, the Senate Report on CAFA notes that CAFA amended § 1332 "to allow more federal courts to hear more interstate class actions on a diversity jurisdiction basis, and (b) modifies the federal removal statute to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts if any of the defendants so desire." SEN. REP. NO. 109-14 at 5 (2005). Thus, CAFA was designed to make it more difficult for plaintiffs' counsel to manipulate the legal system by exploiting procedural rules to avoid diversity jurisdiction and removal to federal courts. Congress specifically identified one purpose of CAFA was to "restore the intent of the framers of the United States Constitution by providing for Federal court

consideration of interstate cases of national importance under diversity jurisdiction." CAFA, Pub. L. 109-2, § 2(b)(3), 119 Stat. 4-5. The stated intention to expand federal jurisdiction demonstrates why the holding of *Shamrock Oil* should not apply to removals of class actions under CAFA. In *Shamrock Oil*, the court recognized Congress changed the text of the statute at issue to restrict federal jurisdiction. Section 1453(b), however, reflects a clear intent to expand federal jurisdiction. *See Shamrock Oil*, 313 U.S. at 107; CAFA, Pub. L. 109-2, § 2(b)(3), 119 Stat. 4-5; 28 U.S.C. § 1453(b). Thus, the legal environment surrounding the statute at issue in *Shamrock Oil* was dramatically different than the legal environment in which CAFA was drafted and enacted.

In addition, the panel's holding creates a loophole in CAFA that permits class action plaintiffs to avoid federal court merely by waiting to bring their class actions as counterclaims, even though Congress clearly intended for such class actions to be litigated in federal court. Under the Seventh Circuit's holding in this case, a company that must pursue legal action in state court to seek redress for any injury is vulnerable to being forced to defend in state court the exact types of class actions that Congress has indicated should be litigated in federal court. This effect is especially pronounced in states such as Illinois, where the counterclaim need not even be related to the original complaint. 735 ILCS 5/2-608; *Johnson v. Moon*, 3 Ill.2d 561 (Ill. 1954) ("[S]o long as the counterclaims are directed against original parties to the suit it is not necessary that they be germane to

the matters in the complaint.") This unfairness is exacerbated in circumstances where the plaintiff is forced to file the original action in state court by virtue of the lack of federal court jurisdiction or otherwise. By allowing "any defendant," including counterclaim defendants, to remove class actions to federal court, Congress plainly foreclosed such an exception from being read into the statute, an exception that would go far in swallowing the rule.

The holding of the Seventh Circuit allows class action plaintiffs to completely circumvent CAFA by waiting to bring their class actions as counterclaims. The panel's holding also creates a disparity in rights afforded to defendants that the plain language of § 1453(b) shows Congress did not intend. Under the panel's interpretation of § 1453(b), class actions that would be removable under CAFA, if filed independently as a stand-alone action, must stay in state court if the class action is filed as a counterclaim. Congress intended CAFA to reduce class action abuses by allowing all class actions involving more than 100 putative class members, in cases where minimal diversity exists, and which are valued in excess of $5 million dollars, to be removed to federal court. If, however, a class action plaintiff chooses to bring the same class action as a counterclaim, the counterclaim defendant does not enjoy the protection of CAFA. Congress could not have intended this discrepancy.

C. The Question Presented In This Case Is Recurring and of National Importance.

The Supreme Court has not addressed the issue presented here. This Court should review the Seventh Circuit Court of Appeals' decision in this case because it raises a recurring issue of national importance. While there is no circuit split, the Court ought to review the Seventh Circuit's holding and issue a determinative interpretation of § 1453(b). Over the last few years, plaintiffs' counsel have increasingly filed class actions that would otherwise qualify for removal under CAFA, but have been able to avoid federal jurisdiction by labeling the class claims as a counterclaim.[5]

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5. In the following cases, courts concluded that a party that was something other than an original defendant could not remove qualifying class actions to federal court under CAFA: *Palisades Collection, LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008) (denying party added to suit by way of class action counterclaim from removing under 28 U.S.C. 1453(b)); *Progressive W. Ins. Co. v. Preciado* 479 F.3d 1014 (9th Cir. 2007)(stating in dicta that a plaintiff/counterclaim defendant may not remove under 28 U.S.C. 1453(b)); *Liberty Credit Servs. v. Yonker*, Case No. 5:10-CV-00838, 2010 U.S. Dist. LEXIS 64933 (N.D. Ohio June 29, 2010); *Capital One (USA) N.A. v. Reese*, Case No. 5:10CV580, 2010 U.S. Dist. LEXIS 60608 (N.D. Ohio June 18, 2010); *American Express Bank, FSB v. Percin*, No. CIV S-10-0331 LKK DAD PS, 2010 U.S. Dist. LEXIS 15989 (E.D. Cal. Feb. 23, 2010); *Am. Gen. Fin. Servs. v. Griffin*, 685 FSupp.2d 729 (N.D. Ohio Feb. 17, 2010); *CitiFinancial, Inc. v. Lightner*, Civil Action No. 5:06CV145, 2007 U.S. Dist. LEXIS 41338 (N.D. W.Va. June 6, 2007); *Unifund CCR Ptnrs v. Wallis*, Civil Action Nos. 06-CV-545-GRA, 06-CV-546-GRA, and 06-CV-547-GRA, 2006 U.S. Dist. LEXIS 17989

(Cont'd)

Indeed, just last year, AT & T Mobility LLC filed a petition for writ of certiorari in this Court seeking this Court's resolution of the same question Petitioner presents. Although this Court denied the petition, it is now clear that this is a recurring issue requiring guidance from this Court. *See AT&T Mobility LLC v. Shorts*, 129 S.Ct. 2826 (2009) In addition, several other cases in district courts across the United States have confronted this same issue and have generally refused to permit removal. The Seventh Circuit's holding, though consistent with other courts, is incorrect because it ignores both the letter and spirit of CAFA and creates a gaping loophole in CAFA that Congress certainly did not intend.

(Cont'd)

(D. S.C. Apr. 7, 2006). Only one court, *Deutsche Bank Nat'l Trust Co. v. Weickert* has held that 28 U.S.C. § 1453(b) authorizes class-action defendants, joined by way of counterclaim, to remove to federal court. *Deutsche Bank Nat'l Trust v. Weickert*, 638 FSupp.2d 826, 830 (N.D. Ohio 2009) *appeal docketed*, No. 09-4190 (6th Cir. Sept. 29, 2009). Although the Sixth Circuit Court of Appeals granted defendants' petition for permission to appeal under 28 U.S.C. § 1292(b), neither party has submitted briefing. Rather, according to the docket, it appears the parties are in the process of entering a stipulation to dismiss the appeal with prejudice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2010

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MARCH 24, 2010

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 10-8008 & 10-8009

FIRST BANK,

Plaintiff, Counterdefendant-Petitioner,

v.

DJL PROPERTIES, LLC, *et al.*,

Defendants, Counterplaintiffs-Respondents.

Petitions for Leave to Appeal from the United States District Court for the Southern District of Illinois.
Nos. 09-cv-969-MJR & 09-cv-970-JPG
Michael J. Reagan and J. Phil Gilbert, *Judges.*

Submitted March 4, 2010—Decided March 24, 2010

Before EASTERBROOK, *Chief Judge*, and ROVNER and WILLIAMS, *Circuit Judges.*

EASTERBROOK, *Chief Judge*. First Bank commenced two suits in state court against DJL Properties, which filed counterclaims styled as class actions. First Bank then filed notices of removal, invoking

the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453. The proceedings were assigned to different district judges. Judge Gilbert remanded one of the suits, concluding that a litigant who initially chose the state forum cannot remove even after becoming a counterclaim defendant. 2010 U.S. Dist. LEXIS 7204 (S.D. Ill. Jan. 27, 2010). Judge Reagan then remanded the other suit, adopting Judge Gilbert's reasoning. 2010 U.S. Dist. LEXIS 7700 (S.D. Ill. Jan. 29, 2010). We grant First Bank's petition for leave to appeal, see § 1453(c)(1), because the cases present an issue not yet resolved in this circuit.

Chapter 89 of the Judicial Code, 28 U.S.C. §§ 1441-53, authorizes removal of certain cases by "defendants." Almost 70 years ago, the Supreme Court concluded that a litigant who files suit in state court is a "plaintiff" and cannot remove the case, even if the defendant files a counterclaim and the original plaintiff then wears two hats, one as plaintiff and one as defendant—and even if the counterclaim is distinct from the original claim and could have been a separate piece of litigation. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). That rule may be as old as 1867. See *West v. Aurora*, 73 U.S. 139, 142, 18 L. Ed. 819 (1867). It remains the law for removal in general, and two circuits have held that it applies to removal under the Class Action Fairness Act in particular. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008); *Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir. 2007). Judge Gilbert held that *Shamrock Oil*, *Palisades Collections*, and *Progressive West Insurance* prevent First Bank from removing;

Judge Reagan agreed; so do we. We conclude that *Palisades Collections* and *Progressive West Insurance* were rightly decided.

Section 1453(b) says that a "class action" (a defined term) may be removed "in accordance with section 1446" whether or not "any defendant" is a citizen of the state in which the suit is pending, and "without the consent of all defendants". (Otherwise every defendant must sign the notice of removal. *Chicago, Rock Island & Pacific Ry. v. Martin*, 178 U.S. 245, 20 S. Ct. 854, 44 L. Ed. 1055 (1900).) The 2005 Act thus refers us to § 1446, which specifies where and when "defendants" file notices of removal. Section 1441, which creates the right of removal for cases that could have been filed initially in federal court, also says that "defendants" may remove a suit.

First Bank contends that the word "defendant" in § 1453(b) includes a counterclaim defendant even though the word "defendant" in § 1441 and § 1446 does not. That would make hash of Chapter 89, because § 1453(b) refers to § 1446; unless the word "defendant" means the same thing in both sections, the removal provisions are incoherent. More than that: the word "defendant" has an established meaning in legal practice, and it is vital to maintain consistent usage in order to ensure that Members of Congress (and those who advise them) know what proposed language will do, and people can understand the meaning of statutes.

It does not follow from the fact that the 2005 Act expands the set of removable cases that it must use "defendant" in a novel way. The statute employs time-tested legal language. If the drafters of the 2005 Act wanted to negate *Shamrock Oil*, they could have written "defendant (including a counterclaim defendant)" or "any party" (the phrase in 28 U.S.C. § 1452(a) for removal in bankruptcy proceedings). But they chose the unadorned word "defendant," a word with a settled meaning.

First Bank observes that in § 1453(b) the word "any" precedes the word "defendant". "Any" is inclusive, to be sure, but the word that it modifies remains "defendant"—which First Bank is not, under *Shamrock Oil*. "Any" appears twice. The function of the first "any" in § 1453(b) is to establish that § 1441(b), which provides that a home-state defendant can't remove a diversity suit, does not apply. (The context is: "without regard to whether any defendant is a citizen of the State in which the action is brought".) The function of the second "any" is to establish that a single defendant's preference for a federal forum prevails, notwithstanding *Martin*. (The context is: "except that such action may be removed by any defendant without the consent of all defendants".) Neither instance of the word "any" implies that "defendant" means something different in § 1441(b) and § 1453(b).

By using a word with an established meaning, Congress produces the established result. See, e.g., *Nken v. Holder*, 129 S. Ct. 1749, 1759, 173 L. Ed. 2d 550

(2009); *Whitfield v. United States*, 543 U.S. 209, 216, 125 S. Ct. 687, 160 L. Ed. 2d 611 (2005). See also *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (applying this approach to the 2005 Act). Giving legal words their standard legal meaning spares judges and lawyers expensive tours through the legislative history and avoids the impossible task of trying to guess what Members of Congress may have "had in mind" or "intended" about statutory language. See *Hor v. Gonzales*, 400 F.3d 482, 484-85 (7th Cir. 2005). Doubtless First Bank is right to say that exempting counterclaims from § 1453 means that the 2005 Act achieves less than it otherwise would, but "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (emphasis in original). Congress enacted a *rule* allowing removal by "defendants"; it did not say anything similar to: "Courts may allow removal whenever the case involves a large, multi-state class action."

The word "defendant" in § 1453(b) means what the word "defendant" means elsewhere in Chapter 89-and, as *Shamrock Oil* held, that word does not include a plaintiff who becomes a defendant on a counterclaim.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JANUARY 29, 2010

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 09-CV-0969-MJR

FIRST BANK,

Plaintiff,

v.

DJL PROPERTIES, LLC; JONATHON E. GUTHRIE; and LISA M. GUTHRIE,

Defendants.

ORDER

REAGAN, District Judge:

First Bank removed this case from the Circuit Court of Saint Clair County, Illinois on November 17, 2009, on the basis of a counterclaim in apparent disregard of Supreme Court case law. ***See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).** The Court ordered supplemental briefing because it doubted jurisdiction. It turns out that First Bank removed another case from Saint Clair County to this Court on the same day with the same counterclaim. That case was assigned to

another District Judge who also doubted jurisdiction. ***First Bank v. DJL Props., LLC*, No. 09-CV-0970-JPG (S.D. Ill. Jan. 27, 2010) (Gilbert, J.).**[1] For the reasons stated in Judge Gilbert's opinion (*see id.* Doc. 21), the Court finds that it lacks subject-matter jurisdiction and **REMANDS** the case to the Circuit Court of Saint Clair County, Illinois.

IT IS SO ORDERED.

DATED January 29, 2010,

s/ Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

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1. The Court reminds counsel for Plaintiff to indicate related cases on the Court's civil cover sheet when filing a new case, even if the related cases are filed simultaneously with the new case. This will not only increase judicial efficiency by making sure that related cases are assigned to the same District Judge, ***see Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511 (7th Cir. 1999)**, but will also eliminate any unintended appearance of judge shopping, ***see* S.D. Ill. R. 40.1(a)** ("Civil cases are randomly assigned to a District Judge pursuant to Administrative Order as from time to time amended by the Court. Any action taken to avoid the random assignment will subject that party and that party's attorney(s) to the full disciplinary power and sanctions of this Court."). This "gentle reminder" is in lieu of a Rule to Show Cause.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JANUARY 27, 2010

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 09-cv-970-JPG

FIRST BANK,

Plaintiff/Counterdefendant,

v.

DJL PROPERTIES, LLC,

Defendant/Counterplaintiff,

and

JONATHON E. GUTHERIE, LISA M GUTHERIE, AMERICAN BOTTOMS REGIONAL WASTEWATER TREATMENT FACILITY, METRO EAST SANITARY DISTRICT, THE VILLAGE OF SAUGET, ALL UNKNOWN OWNERS AND NON-RECORD CLAIMANTS,

Defendants.

Appendix C

MEMORANDUM AND ORDER

This matter comes before the Court on the Court's December 7, 2009, order to show cause why this case should not be remanded to state court (Doc. 11). Plaintiff/counterdefendant First Bank has responded to the order to show cause (Doc. 12), defendant/counterplaintiff DJL Properties, LLC, has replied to that response (Doc. 15), and First Bank has replied to the reply (Doc. 19). For the following reasons, the Court will remand this case to state court.

This case originated in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois. Plaintiff First Bank's complaint alleges a state law claim for mortgage foreclosure. In response, defendant DJL Properties, LLC ("DJL"), filed a class action counterclaim alleging state law causes of action under several Illinois statutes and a state law cause of action for breach of contract. Believing the class action counterclaim created original federal jurisdiction over this action under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2)(A), First Bank filed a notice of removal.

In light of Seventh Circuit admonitions, *see, e.g.*, *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072 (1992), the Court has undertaken a rigorous initial review of pleadings to ensure that jurisdiction exists. Here it does not because removal jurisdiction only exists where a defendant files a notice of removal. *See Shamrock Oil & Gas v. Sheets*, 313 U.S.

100, 107-08, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). Here, the plaintiff/counterdefendant is attempting to remove this case.

In its notice of removal, First Bank acknowledges that under *Shamrock Oil* the foregoing defects would require remand of this case had it not contained a class action counterclaim. *Shamrock Oil* established that the federal law authorizing removal by a defendant does not include removal by a counterdefendant.[1] *Id.* at 107-08. In that case, a plaintiff/counterdefendant removed an action to federal court on the basis of diversity jurisdiction over the counterclaim. *Id.* at 103. The Supreme Court noted that a prior version of the removal statute had allowed "either party" to remove a case but that Congress had amended the language to allow removal only by "the defendant or defendants." *Id.* at 106-07. The Court reasoned that, had Congress intended to allow plaintiffs to maintain the right of removal they

1. The *Shamrock Oil* Court examined a prior version of the removal statute, but that version is substantively indistinguishable from 28 U.S.C. § 1441 in any way relevant to this case. 28 U.S.C. § 1441(a) states in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

had under the "either party" version of the statute, it would have explicitly said so in the amendment language. *Id.* at 107. Instead, Congress chose language it knew the Supreme Court had construed in a prior case to withhold the power of removal from a plaintiff/counterdefendant. *Id.* at 107-08 (citing *West v. Aurora City*, 73 U.S. 139, 141-42, 18 L. Ed. 819 (1867) (6 Wall.)). The *Shamrock Oil* Court further noted the need to respect the independence of state courts by restricting removal jurisdiction only to the precise limits set forth in the removal statute. *Id.* at 109. The Court concluded that when the removal statute allowed for removal by "the defendant or defendants," it did not confer that right on plaintiff/counterdefendants. *Id.* at 106-07.

First Bank argues that CAFA changed the long-standing, well-established rule set forth in *Shamrock Oil* because CAFA refers to the ability of "any defendant" to remove a class action regardless of the citizenship or consent of the other defendants. 28 U.S.C. § 1453(b).[2]

2. 28 U.S.C. § 1453(b) states in its entirety:

> **In general.**—A class action may be removed to a district court of the United States in accordance with section 1446 (except the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. § 1446(a), in turn, states in pertinent part: "A defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States . . . a notice of removal. . . ."

It believes that, after CAFA, a plaintiff sued in a class action counterclaim may remove the entire action to federal court regardless of the claims pled in the original complaint. It bases this argument on the language of § 1453(b) and Congressional intent to expand federal jurisdiction by enacting CAFA. As the party invoking federal jurisdiction, First Bank bears the burden of demonstrating the existence of that jurisdiction, and the Court should construe the removal statute narrowly. *See Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 758 (7th Cir. 2009) (citing *Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)).

In support of its position, First Bank cites *Deutsche Bank Nat'l Trust v. Weickert*, 638 F. Supp. 2d 826 (N.D. Ohio 2009). *Deutsche Bank* involved a case similar to the case at bar. There, counterdefendants (who were not original plaintiffs) filed a notice of removal of a case that began as a state law foreclosure action but that included state law class action counterclaims. *Id.* at 827. The *Deutsche Bank* court read the "any defendant" language in § 1453(b) to encompass counterdefendants and to expand removal beyond the bounds of § 1441(a). *Id.* at 829. The court found this consistent with Congress' purpose in CAFA to expand federal jurisdiction to include interstate class actions of national importance. *Id.* at 829-30. A contrary ruling, the court said, would contravene Congressional intent. *Id.* at 830.

The Court does not find *Deutsche Bank* persuasive. Instead, it agrees with the Fourth Circuit Court of Appeals' decision in *Palisades Collections LLC v. Shorts*,

552 F.3d 327 (4th Cir. 2008). In that case, the plaintiff filed a state law collection action, and the defendant filed a class action counterclaim against the plaintiff and additional counterdefendants. *Id.* at 329. A newly added counterdefendant then filed a notice of removal on the grounds that the federal court had original jurisdiction over the counterclaim under CAFA. *Id.*

The *Palisades* court held that § 1441(a) did not permit removal by a counterdefendant. It reasoned that *Shamrock Oil* established that a counterdefendant is not a "defendant" allowed to remove a case under § 1441(a). *Id.* at 333. As explained in *Shamrock Oil*, Congress made that decision when it amended the removal statute, and the courts must respect that decision when exercising removal jurisdiction. *Id.*

Palisades also rejected the notion that § 1453(b) changed that general rule where a counterdefendant tries to remove a case based on CAFA jurisdiction. *Id.* at 336. First, it noted that § 1453(b) does not expressly allow removal by counterdefendants. It refers only to removal by a "defendant" and cross-references § 1446, which also speaks only to procedures for removal by "a defendant or defendants." *Id.* at 334. The *Palisades* court presumed Congress understood the established interpretation of "defendant" set forth decades earlier by *Shamrock Oil* and declined to find that Congress intended to change that interpretation by implication with § 1453(b). *Id.* at 334. Second, the court held that the two phrases containing the "any defendant" terminology in § 1453(b) do not change the

Shamrock Oil rule. On the contrary, the court interpreted "defendant" consistently with the established meaning of "defendant" in § 1441(a) — that is, as only an original defendant — to refer only to eliminating the forum defendant rule of § 1441(b) and the judicially recognized unanimity requirement. *Id.* at 335-36. The meaning of "defendant," the court held, is not changed by the modifier "any." *Id.* at 335. The court concluded, "Reading § 1453(b) to also allow removal by counter-defendants, cross-claim defendants, and third-party defendants is simply more than the language of § 1453(b) can bear." *Id.* at 336.

Finally, the *Palisades* court noted that, although Congress intended to expand federal jurisdiction by enacting CAFA, the Court must still interpret CAFA as it is written, not as Congress might have intended to write it. *Id.*

The Ninth Circuit Court of Appeals came to a similar conclusion for similar reasons in *Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007) ("CAFA does not alter the longstanding rule announced in Shamrock that precludes plaintiff/cross-defendants from removing class actions to federal court."

The Court agrees with the *Palisades* and *Progressive* holdings. The text of § 1453(b) does not expressly permit a plaintiff/counterdefendant to remove a class action to federal court. It does not impliedly do so either. For decades before Congress passed CAFA,

the law was well-established that, in the removal context, "defendant" meant only an original defendant. Congress is presumed to have known this, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and the Court will not find that it intended to alter this understanding in the absence of express language doing so, as it did when it wanted to change other aspects of class action jurisdiction. *See, e.g.*, 28 U.S.C. § 1332(d)(10) (altering the way citizenship of an unincorporated association is determined in class actions); 28 U.S.C. § 1453(b) (altering the unanimity requirement, the forum defendant rule and the limitation period for removal).

Furthermore, the Court finds that the use of the phrase "any defendant" does not mean, as First Bank argues, "any type of defendant." When viewed with the legal landscape as it existed when CAFA was enacted and in the context of the removal statutes as a whole, the Court believes "any defendant" is more likely to mean "any of the defendants," with "defendants" being interpreted as it was in *Shamrock Oil*.

Clear congressional intent to expand federal jurisdiction with CAFA does not change the Court's conclusion. It is true that by enacting CAFA, Congress intended to expand federal jurisdiction and, indeed, it did so by allowing expanded filing and removal of original class actions. However, such an intent does not justify expansion of jurisdiction to cases not expressly authorized by statute. Respect for federalism still requires a narrow reading of the removal statutes, and the Court can only interpret the laws as they are written.

DJL Properties further requests attorney's fees and costs for First Bank's improper removal of this case. Section 1447(c) states, in pertinent part, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005). The Court retains discretion to determine if unusual circumstances counseling against this general rule exist. *Id.* This rule serves to "deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Id.* at 140. Because the question of removal under CAFA by a plaintiff/counterdefendant based on a class action counterclaim has not been explicitly addressed by the Supreme Court or the Court of Appeals for the Seventh Circuit and has been subject to various rulings by district courts, the Court finds that there was an objectively reasonable basis for the removal of this case. It therefore declines to award attorney's fees under 28 U.S.C. § 1447(c).

For the foregoing reasons, the Court finds that it does not have removal jurisdiction over this case and **REMANDS** it to the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois.

IT IS SO ORDERED.
DATED: January 27, 2010

/s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 22, 2010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 22, 2010

Before

FRANK H. EASTERBROOK, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

Appeal from the United States District Court for the Southern District of Illinois.

Nos. 09-cv-969-MJR & 09-cv-970-JPG
Michael J. Reagan and J. Phil Gilbert, *Judges.*

Nos. 10-8008 & 10-8009

FIRST BANK,

Plaintiff, Counterdefendant-Petitioner,

v.

DJL PROPERTIES, LLC, *et al.*,

Defendants, Counterplaintiffs-Respondents.

Appendix D

Order

First Bank filed a petition for rehearing and rehearing en banc on April 7, 2010. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E — RELEVANT STATUTES

**Class Action Fairness Act of 2005,
Pub. L. No. 109-2, 119 Stat. 4 provides:**

(a) Findings.—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

Appendix E

(b) Purposes.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

28 U.S.C. § 1332 provides in pertinent part:

§ 1332. Diversity of citizenship; amount in controversy; costs

* * * * *

(d) (1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an

action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A) (i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of

the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453 [28 USCS § 1453], an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453 [28 USCS § 1453], a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B) (i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2) [28 USCS § 1711(2)]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C) (i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407 [28 USCS

§ 1407], or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407 [28 USCS § 1407].

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

* * * * *

Appendix E

28 U.S.C. § 1441 provides in pertinent part:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [28 USCS §§ 1441 et seq.], the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * * * *

(e) (1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

> (A) the action could have been brought in a United States district court under section 1369 of this title [28 USCS § 1369]; or
>
> (B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 [28 USCS § 1369] in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title [28 USCS § 1446], except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 [28 USCS § 1369] in a United States district court that arises from the same accident as

the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) [28 USCS § 1407(j)] has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 [28 USCS § 1369] and an action in which jurisdiction is based on section 1369 of this title [28 USCS § 1369] for purposes of this section and sections 1407, 1697, and 1785 of this title [28 USCS §§ 1407, 1697, and 1785].

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

* * * * *

28 U.S.C. § 1446 provides in pertinent part:

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the

grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [28 USCS § 1332] more than 1 year after commencement of the action.

* * * * *

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

* * * * *

28 U.S.C. § 1453 provides in pertinent part:

§ 1453. Removal of class actions

(a) Definitions. In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1) [28 USCS § 1332(d)(1)].

(b) In general. A class action may be removed to a district court of the United States in accordance with section 1446 [28 USCS § 1446] (except that the 1-year limitation under section 1446(b) [28 USCS § 1446(b)] shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders.

(1) In general. Section 1447 [28 USCS § 1447] shall apply to any removal of a case under this section, except that notwithstanding section 1447(d) [28 USCS § 1447(d)], a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment. If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period. The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

* * * * *